reasonably be expected to be received from the land and the building or by the method of addition of a reasonable assessment of the value of the house to the value of the land.

We must not however be taken as expressing a preference for one method over the other. In the case before us, we do not have the benefit of the facts and arguments which would enable the application of the capitalisation method and we are therefore in allowing the appeal from the decision of the High Court, forced to adopt the addition method.

The appeal is allowed with costs here. The order of the Superintendent is restored, substituting, however, the increases found by the High Court on the land values for his.

The High Court made no order as to the costs of the references before it. For the removal of any doubt, we order that at the High Court, each party bears its own costs.

Appeal allowed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.*

TAN SWEE HOE CO. LTD. v. ALI HUSSAIN BROS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Salleh Abas F.JJ.) December 11, 1979]

[Johore Bahru — Federal Court Civil Appeal No. 169 of 1978]

Landlord and Tenant — Written agreement of tenancy — Oral agreement to allow tenants to occupy premises for so long as they wished on payment of tea money — Dispute as to rent — Action by landlord for possession — Tenants entitled to stay in premises as long as they wished — Whether evidence of oral agreement can be given — Evidence Act, 1950, ss. 91 & 92.

Evidence — Written agreement of tenancy — Earlier oral agreement that tenants could occupy premises for as long as they wished on payment of tea money — Whether admissible — Collateral contract — Evidence Act, 1950, ss. 91 & 92.

Contract — Written contract — Collateral oral contract — Proof of — Evidence Act, 1950, ss. 91 & 92.

In this case on the facts found by the learned trial judge the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished on payment of $14,000 as tea money. Two written agreements of tenancy were later executed but they did not refer to the appellants' promise. A dispute arose as to payment of rent and the appellants eventually sued for vacant possession, arrears of rent, mesne profits and damages. In their defence the respondents claimed that under the oral agreement they were entitled to stay in the premises as long as they wished and so long as they paid the rent regularly. The learned trial judge dismissed the appellant's claim and ordered the appellants to register a lease in favour of the respondents for 28 years. He assessed the rent at $293.40 per month in the light of the increase of assessment. The appellants appealed and the question that arose was whether the evidence of the oral promise could be given in view of sections 91 and 92 of the Evidence Act.

Held: (1) an oral promise, given at the time of contracting which induces a party to enter into a contract overrides any inconsistent written agreement. The device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement;

(2) in this case the learned trial judge was correct in giving effect to the oral agreement and in interpreting it to give the respondents a lease of 28 years from the date of the agreement.

Cases referred to:-

(1) *Siew Soon Wah* v. *Yong Tong Hong* [1973] 1 M.L.J. 133.

(2) *Heilbut Symons & Co.* v. *Buckleton* [1913] A.C. 30, 47.

(3) *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] Ch. 129.

(4) *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.* [1965] 2 All E.R. 65, 67.

(5) *Mendelssohn* v. *Normand Ltd.* [1970] 1 Q.B. 177.

(6) *J. Evans & Son* v. *Andrea Merzario* [1976] 2 All E.R. 930.

(7) *Brikom Investments Ltd.* v. *Carr* [1979] 2 All E.R. 753.

(8) *De Lassalle* v. *Guildford* [1901] 2 K.B. 215, 222.

The following cases were also cited in argument:- *Kingswood Estate Co. Ltd.* v. *Anderson* [1963] 2 Q.B. 169, 179; *Wakeham* v. *Mackenzie* [1968] 2 All E.R. 783; *Chalmers* v. *Pardoe* [1963] 3 All E.R. 552, 556; *Kepong Prospecting Ltd. & Ors.* v. *Schmidt* [1968] 1 M.L.J. 170, 175 H, E & F; *L. Schuler A G* v. *Wickman Machine Tool Sales Ltd.* [1973] 2 All E.R. 39, 53, 55, 59, 60; *Ho Ying Chye* v. *Teh Cheong Huat* [1965] 2 M.L.J. 261; *Lee Ah Low* v. *Cheong Lep Keen & Anor.* [1970] 1 M.L.J. 7, 9; *Parker* v. *Taswell* 44 E.R. 1106, 1110, 1111, 1113; *Leong Gan & Ors.* v. *Tan Chong Motor Co. Ltd.* [1969] 2 M.L.J. 8; *Foo Tock Lin* v. *Piong Kew* [1963] M.L.J. 67; *Ariff* v. *Rai Jadunath Majumdar Bahadur* (1931) 47 T.L.R. 238, 239 (P.C.).

FEDERAL COURT.

Thara Singh Sidhu for the appellants.

S.V.K. Singham for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The appellants orally agreed to allow the respondents to occupy their premises for so long as they wished on payment of tea-money. Two written agreements were later executed, but did not refer to the appellants' promise. Sections 91 and 92 of the Evidence Act state that extrinsic evidence is not admissible to vary, add to or contradict the terms of a written agreement. Can the respondents enforce the promise in the light of the two sections of the Evidence Act? The learned judge answered in the affirmative. That sums up the question raised in the instant appeal.

The facts are as follows: In 1957 the respondents were looking for premises in Kluang, Johore, to carry on the business of an eating shop. They found one at No. 11, Jalan Dato Teoh Siew Khor belonging to the appellants. But the premises was not suitable for their purpose as it was designed as a bank. Negotiation commenced with the appellants. The appellants wanted $14,000 tea-money to allow the respondents to occupy the premises. A reduction in the amount of tea-money was offered but rejected. As a result an oral agreement was reached between the parties whereby the respondents were to rent the said premises on payment of $14,000 tea-money and they could stay there for as long as they wished provided they paid rent regularly. Relying on that oral assurance the respondents went into occupation. They paid the tea-money and received the first month's receipt at the back of which were recited seven conditions, viz: no sub-letting without the appellants' consent, no contraband goods to be stored in the premises,

notice by the respondents to appellants on termination of tenancy, prohibition against cutting of firewood within the premises, payment of local council fees, premises to be kept clean and tidy and lastly, appellants' right to terminate tenancy on failure to observe any one of the above conditions. No receipt was given in respect of the tea-money. That we think is obvious. With the consent of the appellants, they expended substantial sum of money to make the necessary alterations to the said premises so that it was fit to be used as an eating shop.

In 1961, the parties entered into a written agreement whereby the rent was increased from $200 to $220 per month. No mention was made of the earlier oral assurance.

In 1967 another written agreement was executed increasing the rent from $220 to $254 per month. It is in substance the same as the previous written agreement except one, that is clause 7 which is in the following terms:

"In the event of any increase in the Town Council assessment, quit rent and other taxes relevant to the premises the rental shall be increased proportionately in accordance with the increase levied by the Government or the Authorities."

At the end of 1968, there was a dispute regarding payment of rent. The appellants demanded an increase of $10 rent in view of the increase in assessment. The respondents did not agree to the increase. They pointed out that as the assessment had only been increased from $349.70 in 1968 to $403.50 in 1969, they said they would be willing to pay the difference, that is, $53.80 per annum, which is equivalent to $4.50 per month. The appellants referred the respondents to clause 7 of the agreement and argued that nowhere was it stated that the rent was to be increased in the same proportion as the increase levied by the Government. They accordingly interpreted it as enabling them to increase rent twice or even ten times. There was exchange of correspondence. In December, 1969, the appellants wrote to the respondents suggesting an amicable settlement on payment of increase of rent in the sum of $55 per month. They wrote again at the end of the month offering a tenancy of 10 years instead of 20 years. In February, 1970, they gave the respondents notice to quit by end of March, 1970. The respondents did not do so. They paid rent for February and March 1970 which were accepted. They forwarded rent for April 1970 but that was refused in view of the notice to quit. They said that the notice was bad to terminate a tenancy which they argued was of an indefinite duration. The rents for April, 1970 and subsequent months are held in a trust account by their solicitors. In October 1970 the appellants issued a second notice to quit by end of November 1970.

The appellants filed their present claim in December 1970, praying for vacant premises, arrears of rent, mesne profits and damages.

The respondents by paragraph 7 of their defence aver that in consideration of the sum of $14,000 paid by them to the appellants on July 18, 1957, the appellants granted to them a contractual tenancy "for as long as the defendant wished to do so and for so long as they paid rent regularly." They counterclaimed that the appellants execute a valid registrable lease for 30 years, alternatively the sum of $64,000 damages for breach of contract; that sum represents $14,000 tea-money, $4,000 for alteration to the said premises, $12,700 for purchase of refrigerator, cupboards and tables and $32,000 for cost of looking for alternative premises.

The learned judge dismissed the appellants' claim with costs. He allowed the respondents' counterclaim and ordered the appellants to register a lease in favour of the respondents for 28 years with effect from August 1, 1957 with the terms and conditions as set out in the 1967 agreement subject to the payment of all arrears of rent which he assessed at $293.40 per month in the light of increase in assessment.

The learned judge was satisfied that the respondents had paid $14,000 tea-money in consideration of which the appellants gave an oral undertaking that the respondents could occupy the premises for as long as they wished provided they paid rent regularly and that rent was to be increased proportionately with the increase in assessment. In so far as this part of the evidence is denied by the appellants, the learned judge preferred and accepted the evidence of the respondents. He pointed out to the overwhelming inference that the appellants acted in such a way as to lead the respondents to believe that they had the right to stay there for as long as they wished provided they paid rent regularly. We see no warrant in the evidence for taking a different view.

The learned judge further held that the correct monthly rent brought about by the increase in assessment is $293.37. We reproduce his findings in full:

"I come now to the amount of monthly rent that should be paid with the proportionate increase of assessment.... In Johor, unlike other States, the assessment is based on the improved value of the property. The present rate of assessment, I believe, is about 1.5% on the improved value. Under paragraph 1 of the 1967 agreement the rent is stated to be $254/- per mensem commencing from May 1, 1967. Paragraph 7 of 1967 agreement speaks of increase in 'assessment rate, quit rent and other taxes'. The increase of rent should therefore be based on the percentage of increase in assessment, quit rent and other taxes. It has been shown that there has been an increase in assessment but not other taxes. In 1968 when the assessment was $349.70, the rent was $254 per mensem. In 1969 the assessment was $403.50. The increase was, therefore, $53.80. In terms of percentage the increase of rent is 15.38%, say 15.5%. The increase should therefore be based on this percentage. I do not think that the defendants are correct in saying that the increase to the annual rent should be the same figure as the increase in the assessment as this would not be proportionate. Since the rent before the increase was $254 per mensem, 15.5% of this is $39.57. The correct monthly rent brought about by the increase in assessment is therefore $293.37 say $293.40."

We agree with his conclusion and do not wish to say any more on the subject. In any event it was not adumbrated before us that that finding is erroneous. It was not pursued as a ground of appeal anyway.

The question that arises for determination is the effect to be given to the agreement "that the respondents could stay for as long as they wished."

After properly addressing his mind to the Privy Council decision in *Siew Soon Wah* v. *Yong Tong Hong*,[1] the learned judge gave effect to the express intention of the parties as spelt out in the agreement

by holding that it was one for the grant of as long a lease as the law allows which, under the provisions of section 221(3)(a) of the National Land Code is a maximum period of 99 years. However in determining the period of the lease he took into account the consideration that it must be proportionate to the value of the property in relation to the maximum period of 99 years. The value of the property was agreed at between $49,000 and $50,000 under a leasehold of 99 years. He simplified the matter by considering the value of the property as $50,000 and the leasehold the appellants have as 100 years and arrived at the conclusion that for $14,000 the period of the lease was 28 years.

We agree with the period of 28 year lease as that will do justice between the parties in the light of surrounding circumstances of the case. But before that proposition can be entertained, a pertinent question to be answered is the contention of counsel for the appellants whether the oral promise can contradict the written agreement of 1967 and be enforced. That question is tied to the salutory provisions of sections 91 and 92 of the Evidence Act, which briefly stated, enact that extrinsic evidence is not admissible to vary or qualify the terms of a written contract.

Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty. *Chitty* on Contracts (24th edition) (paragraph 674) put it this way:

"An assurance given in the course of negotiation may therefore give rise to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however, frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as a separate contract, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point."

In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contract was made by Lord Moulton in *Heilbut Symons & Co.* v. *Buckleton.*[2] "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract." The case of *City and Westminster Properties (1934) Ltd.* v. *Mudd*[3] and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning M.R. summarised it in *Dick Bentley Productions, Ltd.* v. *Harold Smith (Motors), Ltd.*[4]: "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on."

In *Mudd's* case, *supra,* a tenant signed a lease containing a covenant to use the premises for business purposes only. He had in fact resided there for some time and was only induced to sign the lease by an oral assurance that the lessors would not object to his continuing to do so. In an action by the lessors to forfeit the lease for breach of the convenant it was held that the tenant could rely on the oral assurance as "a clear contract acted upon by the defendant to his detriment from which the plaintiffs cannot be allowed to resile." Yet the oral agreement clearly contradicted the lease.

Three recent decisions are worth mentioning, i.e., *Mendelssohn* v. *Normand Ltd.*;[5] *J. Evans & Son* v. *Andrea Merzario;*[6] *Brikom Investments Ltd.* v. *Carr.*[7]

In *Mendelssohn* v. *Normand, supra,* the car owner left his car unlocked at a car park after he had been assured by the attendant that the car would be locked. His suitcase was later stolen from his unlocked car. The parking ticket by its terms protected the defendant. It was also specifically argued that the terms could not be varied by the oral assurance of the attendant. In spite of all that the Court of Appeal held that the assurance given by the attendant that the car would be kept locked overrode the written terms. "The reason is because the oral promise or representation has a decisive influence on the transaction — it is the very thing which induces the other to contract — and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation" (*Per* Lord Denning at page 184). Phillimore L.J. said at page 186: "Whether you regard that promise as a representation or whether you regard it as a collateral term of the contract, or whether you regard the contract as being partly oral and partly in writing in the shape of the ticket it seems to me it can make no real difference."

In *J. Evans & Son* v. *Andrea Merzario, supra,* the defendant forwarding agents assured the plaintiff importers that containers in which the latter's goods were stored would be carried under deck. Prices were renegotiated but nothing was put in writing in relation to the containers being carried below deck. The goods were carried "on the usual terms and conditions appearing on the form." When a machine was lost due to the fact that a container was not stored below deck, the plaintiffs succeeded in the Court of Appeal in enforcing the oral assurance. Lord Denning M.R. considered that the assurance given by the defendant that the containers would be stored below deck was given in order to persuade the plaintiff to accept the use of containers. Because it so induced the plaintiffs, it ought to be binding. "When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold

that it is binding": see *Dick Bentley Production Ltd.* v. *Harold Smith (Motors) Ltd., supra.*

In *Brikom Investments* v. *Carr, supra,* a tenant, relying on the representation made to her by the landlords, that they would repair the roofs at their own expense refused to contribute to the costs of repairs. It was held, *inter alia,* that there was a perfectly good collateral contract bewteen the landlords and her since she had given consideration for the landlords' promise regarding the repairs by entering into the lease in reliance on that promise. "When two parties are about to enter into an agreement for a lease, a lease which imposes on the lessee a very burdensome obligation in respect to repairs, I can see no reason why one party cannot say to the other: 'In relation to those outstanding matters, whatever may be our legal position under the terms of the lease, we will not as landlords enforce that obligation against you.' I see no reason why effect should not be given to such a position. I think the evidence shows that that was the position here; there was a perfectly good collateral contract between these two parties." (*per* Roskill L.J. at page 763).

In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

So it seems to us, following the test of Lord Moulton in the *Heilbut Symons'* case (*supra,* at page 50) that after looking at the totality of the evidence in the present appeal and not from isolated answers given in it, the parties intended or must be taken to have intended that the oral promise was to form part of the basis of the contractual relations between them. The respondents were looking for a place to carry on their eating-shop business. The appellants were only willing to allow them to occupy their premises provided $14,000 tea-money was paid. The respondents would not have paid that substantial sum which is about half the value of the premises but for the promise that they would be allowed to stay there for as long as they wished. The appellants gave such a promise which to our mind against this background plainly amounted to an enforceable contractual promise. In those circumstances, it seems to us that the contract was this: "If we give you $14,000 tea-money, you will ensure that we can stay for as long as we wish"; and the appellants agreed that this would be so. Thus there was a breach of that contract by the appellants when they issued the notice to quit. We do not see how the appellants can escape from the bond of the oral promise which was given and which seems to us to have been given for perfectly good consideration. It may well be asked: why not put the oral promise into the written agreement if it is so important? The short answer is that often people do not behave in this way and the law should accommodate to the needs of ordinary people and not expect from them the responses of astute businessmen. This case seems to us to fall within the principle laid down by A.L. Smith M.R. in *De Lassalle* v. *Guildford*[8]: "The next question is: Was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. . . . The present contract of warranty by the defendant was entirely independent of what was to happen during the tenancy."

We would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Goh Soot Hwang & Co.; Singham & Co.*

PERTUBOHAN BERITA NASIONAL MALAYSIA v. STEPHEN KALONG NINGKAN

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 5 & December 27, 1979]

[Kuching — Federal Court Civil Appeal No. 122 of 1979]

Practice and Procedure — Interrogatories — Discretion of Court — R.S.C. 1957, O. 31, r. 2

In this case the respondent took out a suit for libel in March 1973 against the appellant, a news agency. The words complained of appeared in the *Straits Times* of April 19, 1972. The appellant admitted the publication in the *Straits Times* but would not admit doing so to various other persons as claimed by the respondent in Malaysia and Singapore. After the case had been set down for trial, the respondent applied to court for an order to the appellant to answer interrogatories to ascertain the scope of the publication. The learned trial judge allowed the application. The appellants appealed.

Held: (1) the court has an undoubted discretion to grant or refuse interrogatories and in the exercise of its discretion will give leave to such as are necessary for disposing fairly the action or for saving costs;

(2) in this case what the respondent alleged was that the words complained of had been published to "various persons in Malaysia and Singapore" some of whom had printed the alleged libel in their newspapers circulating in these countries. There was no averment that the various persons were unknown to the respondent and no reason was given why with ordinary diligence, such persons could not be ascertained by the respondent without recourse to the court;

(3) in the circumstances the appeal should be allowed and the application for interrogatories refused.

Cases referred to:-

(1) *Ellis* v. *Ambler* (1877) 36 L.T. 410.

(2) *Millar* v. *Harper* (1888) 38 Ch. D. 110.

(3) *London & Provincial Marine Insurance Co.* v. *Davies* (1877) 5 Ch. D. 775.

(4) *Barham* v. *Lord Huntingfield* [1913] 2 K.B. 193.

(5) *Russell* v. *Stubbs* 52 Sol. J. 580; [1913] 2 K.B. 200.

HIGH COURT.

T.O. Thomas for the plaintiff.

John Ko for the defendant.

Cur. Adv. Vult.

Yusoff J.: This is an application for leave by the plaintiff to serve interrogatories on the defendant relating to a libel action alleging that the defendant had published defamatory reports in newspapers against the plaintiff.